Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Children's Television Obligations	)	MM Docket No. 00-167
of Digital Television Broadcasters	)	
	)	

PETITION FOR RECONSIDERATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby petitions for reconsideration of certain aspects of the Commission's *Report and Order* in the above-captioned docket. NCTA is the principal trade association of the cable television industry. Its members include owners and operators of cable television systems serving ninety percent of the nation's cable television customers and more than 200 cable program networks.

The *Notice of Proposed Rulemaking* ("*NPRM*") in this proceeding sought comment "on a range of issues related to the obligation of digital television ("DTV") *broadcasters* to serve children."[1] The *NPRM* identified issues "that arise in both the analog and digital *broadcasting* contexts." But the *Report and Order* adopted rules that apply much more broadly and sweep within their reach children's programming shown on *cable* networks.

In particular, the Commission modified its decades-long definition of "commercial matter" to now include promotional material for programs airing on the same channel. Because the cable industry is covered by the rules restricting the amount of commercial time that can be aired during children's programming, this new interpretation will adversely affect numerous cable programmers who offer a significant amount of children's programming – in many cases,

significantly more than the amount provided by broadcast stations. The Commission failed to consider the legal and policy problems raised by this redefinition as applied to cable.

Moreover, the Commission for the first time extended the policies underlying its children's television rules to websites associated with those cable networks. Even assuming that the Commission has authority to regulate in this area, it has created significant confusion and uncertainty about permissible website practices. The *Report and Order* does not address these issues, and the Commission should clarify them on reconsideration.

I. SAME-NETWORK PROMOTIONAL MATERIAL SHOULD NOT BE CONSIDERED COMMERCIAL MATTER.

Like commercial broadcasters, cable operators are subject to limits on the amount of commercial matter that may appear during children's programming. In implementing the Children's Television Act of 1990 ("CTA"), the Commission limited both broadcasters and cable operators to no more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.[2]

Until now, the definition of commercial matter has always excluded promotional material. In its initial implementation of the CTA, the Commission expressly provided that "promotions of upcoming programs which do not contain … sponsor-related mentions will not be deemed commercial matter."[3] In its *Report & Order*, however, the Commission reversed itself and revised its definition of commercial matter to "include promotions of television

---

1 *Children's Television Obligations of Digital Television Broadcasters Report and Order and Further Notice of Proposed Rulemaking,* MM Docket No. 00-167, November 23, 2004 at ¶ 1.

2 47 C.F.R. § 76.225(a).

3 *Policies and Rules Concerning Children's Programming*, 6 FCC Rcd. 2111, 2112 (1991).

programs or video programming services other than children's educational and informational programming."[4]

The Commission's rationales for making this change are misplaced with respect to cable operators and program networks. As the Commission noted in its *Report and Order*, "[w]e observed in the *Notice* that there is a significant amount of time devoted to these types of announcements in children's programming, thereby often reducing the amount of time devoted to actual program material to an amount far less than the limitation on the duration of commercial matter alone might suggest." The Commission asked whether it should count promotional material as commercial matter "to maximize the amount of time devoted to program material and reduce the time taken by interruptions."

Reducing the amount of time in children's programming that is dedicated to program material is *not* an issue with respect to cable programming. Unlike broadcasters, cable operators have no requirement to carry a minimum amount of children's programming. Broadcasters must provide at least three hours a week of "core programming" (regularly scheduled programming of at least 30 minutes duration, aired between 7:00 a.m. and 10:00 p.m.) whose significant purpose is serving the educational and informational needs of children ages 16 and under.[5] Since cable operators have no such requirement, there is no need for a corollary rule to maximize the actual children's content in programming that counts towards the requirement.

Moreover, the large number of cable networks that do carry children's programming typically carry far more children's programming – including significant amounts of educational

---

[4] *Report and Order*, ¶ 57.

[5] *See* 47 C.F.R. § 73.671, Note 2.

programming – than broadcast stations.[6] Even if promotional material in such programming might reduce the amount of program content in any particular show, there is no reason to fear that any such effect will remotely threaten the abundance of children's programming available on cable networks and cable systems.

The Commission's rule change also will not, as the Commission maintains, serve the statutory objective of "reducing the number of commercial interruptions in children's programming."[7] Cable operators and networks *are* covered by the wholly separate requirement to avoid excessive commercial material during children's programming. But Congress made clear that it did not view promotional material for programming carried by the same network as the sort of interruptions about which it was concerned. Indeed, Congress specifically stated in the legislative history of the CTA that such promotional material was *not* meant to be deemed "commercial matter":

> The Committee intends that the definition of "commercial matter" . . . will be consistent with the definition used by the Commission in its former FCC Form 303. Under Form 303-C, the Commission defined commercial matter to include commercial continuity (advertising message of a program sponsor) and commercial announcements (any other advertising message for which a charge is made, or other consideration is received).
>
> Specifically included in the definition of commercial matter were. . . promotional announcements by a commercial television broadcast station *for or on behalf of another commonly owned or controlled broadcast station* serving the same community; and promotional announcements of a future program where consideration was received for such an announcement or where such announcement identified the sponsor of the future program beyond mention of the sponsor's name as an integral part of the title of the program.

---

[6] Among the cable networks carrying significant amounts of children's programming are Boomerang, Cartoon Network, Discovery Kids Channel, Disney Channel, FamilyNet, GAS, HBO Family, Nickelodeon, Nick 2, Nickelodeon GAS, Nicktoons, Noggin /The "N", Showtime Family Zone, Starz Family, Starz Kids, Toon Disney, and WAM.

[7] *Report and Order,* ¶ 57.

The FCC's former 303-C defined the following as not commercial announcements: promotional announcements (except as defined above) . . . . [8]

In the *Report and Order*, the Commission argues that its ruling is consistent with this legislative history because a station or network carrying promotional material for other programming on the same network is, in fact, receiving "consideration" for airing the material. Thus, according to the *Report and Order*, "the station broadcasting the promotion receives significant consideration for airing these advertisements: specifically, the increased audiences for the promoted program which presumably leads to increased advertising rates for the station."[9]

This is not what the Commission meant by consideration in Form 303-C or what Congress meant in codifying the definition of commercial matter that appeared in that form. If that was the intent, the rule would simply have barred *all* same-network promotional material, since such material is *always* intended to increase audiences for programming, which has the effect of increasing advertising revenues. By including only material for which consideration was received, the Commission – and Congress – clearly meant to encompass material that the network received some form of payment "from others" to carry.[10]

Legislative intent aside, there is no evidence that counting internal promotions as commercials will increase the amount of content of any particular children's program and reduce interruptions of a program with other material. Programs are produced to a given specified length. If promotions are counted toward commercial minutes, *something* will have to be inserted to fill the time required to fit the program into a standard half-hour or hour time slot. At least for the large inventory of existing programming, different material – rather than longer

---

8 *Report of Committee on Energy and Commerce of the House of Representatives*, H.R. Rep. 101-385, 101st Cong., 1st Sess. 15 (1990).

9 *Report and Order*, ¶ 58.

10 *See* Memorandum Opinion and Order, 6 FCC Rcd. 5093, 5095 (1991)

program content – will likely be included in the time that otherwise would have been devoted to promotional messages for upcoming programs.

The Commission also maintains that its decision to count all promotional material except promotions for "core" educational and informational programming as commercial material will have the beneficial effect of "encourag[ing] the promotion of educational and informational programming for children."[11] But it is unlikely that the new rule would have this effect on cable programming.

Broadcasters are required to provide a minimum amount of "core" programming. Therefore, they typically have processes in place for designating the specific programming that meets this obligation. But cable operators and program networks have no such obligation and, therefore, have no separate reason to distinguish "educational and informational" programming from other children's programming that they provide. Without knowing whether particular programming qualified as educational and informational, they would be likely simply not to carry *any* promotional material, rather than to risk carrying non-qualifying material that caused them to exceed their commercial limits.

Limiting same-network promotions on networks that carry a significant amount of children's programming would, in fact, undermine the economics of these networks in a way that would be more likely to *reduce* than increase the amount of such programming. Such promotional material is meant to increase viewership for other programming that appears on the network – and this increased viewership, in turn, provides additional revenue from advertising that appears on that other programming. Ironically, under the revised rule, the more children's programming a network carries, the less opportunity there will be to provide such revenue-

[11] *Report and Order*, ¶ 57.

enhancing promotional material. By making it more costly to carry children's programming, the rule perversely provides incentives to carry less such programming.

II. REGULATION OF WEBSITES IS PREMATURE AND SHOULD BE ADOPTED, IF AT ALL, ONLY AFTER PUBLIC NOTICE, COMMENTS, AND FURTHER CONSIDERATION.

The *Report and Order* for the first time adopted rules governing commercial website information. Specifically, the Commission held that the commercial limits

> require that, with respect to programs directed to children ages 12 and under, the display of Internet website addresses during program material is permitted as within the CTA limitations only if the website: 1) offers a substantial amount of bona fide program-related or other noncommercial content; 2) is not primarily intended for commercial purposes, including either e-commerce or advertising; 3) the website's home page and other menus pages are clearly labeled to distinguish the noncommercial from the commercial sections; and 4) the page of the website to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes (e.g., contains no links labeled 'store' and no links to another page with commercial material.)[12]

In addition, the Commission "prohibit[ed] the display of website addresses in children's programs when the site uses characters from the program to sell products or services."[13]

The *NPRM* contained no notice that the FCC was considering adopting rules that governed how commercial websites must be configured in order to comply with the CTA limits. In fact, the one area in which the FCC suggested regulating websites concerned linking those websites through *interactive* content in children's programming.[14] But the *Report and Order* concluded that "it would be premature and unduly speculative to attempt to regulate" such interactive content at this time.[15] Even assuming, *arguendo*, that the FCC has authority in this

---

[12] *Report and Order*, ¶ 50.

[13] *Id.*, ¶ 51.

[14] *NPRM*, ¶ 32.

[15] *Report and Order*, ¶ 53.

area to impose such detailed rules on cable programmers' websites, the Commission's action in regulating the content of those websites was also premature.

The record in this proceeding did not benefit from comment from those entities that create and run these commercial websites. At a minimum, therefore, we urge the Commission to reconsider its commercial website rules to ensure that website design can achieve the goals of this provision. As things now stand, program networks are required to adjust and reconfigure their websites without having had any input in the requirements with which they must comply, and without knowing precisely how the Commission will interpret those requirements.

Instead of adopting rules in such circumstances, the Commission should seek comments on the extent to which website information may be displayed on children's programming. This would give cable networks and interested parties the opportunity to propose, and the Commission the opportunity to adopt, rules – and interpretive guidelines – that ensure the appropriate separation between website addresses and commercial content on those sites without imposing significant difficulties or expense on the creators of those sites.[16]

CONCLUSION

The cable programming industry has played a leadership role in bringing diverse educational and informational programming to young viewers. It takes seriously its obligation to protect those child audiences against excessive commercialization. However, the *Report and Order* in this proceeding sweeps too wide a net and captures practices that do not address these obligations and instead upsets the careful balance of interests that are embodied in the Children's Television Act. We respectfully urge the Commission to reconsider its decision in the manner described herein.

Respectfully submitted,

/s/ Daniel L. Brenner

Jill Luckett
Senior Vice President
Program Network Policy

Daniel L. Brenner
Michael S. Schooler
Diane B. Burstein
Counsel for the National Cable & Telecommunications Association
1724 Massachusetts Avenue, NW
Washington, D.C. 20036-1903
(202) 775-3664

February 2, 2005

[16] *See*, *e.g.*, Ex Parte Letter of Barbara Gardner, MM Docket No. 00-167 (Dec. 21, 2004) (explaining interest of cable program networks in establishing guidelines to satisfy concerns over commercialization).